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No. 84-188

# In the Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., ET AL., PETITIONERS

*v.*

DEPARTMENT OF ENERGY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the legislative veto provisions of the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA) (Pub. L. No. 93-159, 87 Stat. 629 *et seq.*), as originally enacted and as amended in 1975 by the Energy Policy and Conservation Act (Pub. L. No. 94-163, 89 Stat. 871 *et seq.*), were inseverable from the remainder of the EPAA, such that the entire price control program in effect under that Act between 1973 and 1981 was invalid.

2. Whether this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), should be applied retroactively to require the invalidation of the nationwide price control program under the EPAA and thereby to excuse petitioners from liability for conceded violations of the price control regulations.

3. Whether the House of Representatives' exercise of a legislative veto on two occasions in 1975 to disapprove two phased decontrol proposals by the President requires that those vetoed proposals now be given effect, even though the legislative vetoes were effectively ratified and superseded by two Acts of Congress and petitioners did not challenge the vetoes until seven years thereafter.

4. Whether petitioners may now challenge the price control program on the ground that the President was assertedly too cautious in proposing decontrol measures in 1975 and 1976 because of a concern that Congress might veto a particular decontrol proposal.

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 744 F.2d 98. The opinion of the district court in *Dorchester Gas Producing Co.* v. *Department of Energy* (Pet. App. 41a-62a) is reported at 582 F. Supp. 927, and the opinion of the district court in *In re Department of Energy Stripper Well Exemption Litigation* (Pet. App. 63a-97a) is reported at 578 F. Supp. 586.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 1984. The petition for a writ of certiorari was filed on August 2, 1984. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1).

## STATEMENT

Petitioners contend that the now-expired Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 *et seq.*, which at one time imposed controls on the price of petroleum products, should be retroactively invalidated on the ground that it contained several legislative veto provisions that were unconstitutional under this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983).

### A. The Statutory Program

1. During the summer of 1971, President Nixon invoked his authority under the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796, 12 U.S.C. (1976 ed.) 1904 note, to impose wage and price controls over most sectors of the American economy. The responsibility to enforce those controls was delegated to the Cost of Living Council. Exec. Order No. 11,615, 36 Fed. Reg. 15727 (1971). To combat rapidly rising prices of crude oil and refined oil products, the Cost of Living Council, on August 22, 1973, promulgated price control regulations applicable to the petroleum industry. 38 Fed. Reg. 22536, 23974 (1973).

By November 1973, petroleum shortages had greatly increased as a result of the Arab oil embargo. In response to this crisis, the President requested that Congress act promptly to pass pending emergency energy bills, including provisions that "would grant the President additional authority to allocate and ration energy supplies." 9 Weekly Comp. Pres. Doc. 1319, 1321 (Nov. 8, 1973).

Congress responded immediately. On November 27, 1973, the President signed into law the Emer-

gency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.* The EPAA directed the President to promulgate regulations within 15 days mandating price and allocation controls on petroleum and petroleum products, to remain in effect through February 28, 1975 (§ 4(a), 15 U.S.C. 753(a); § 4(g)(1), 15 U.S.C. (Supp. IV 1974) 753(g)(1)). See Pet. App. 17a-18a. In Section 4(g)(2) of the EPAA, Congress authorized the President to amend the regulations to exempt crude oil, residual fuel oil, or a refined petroleum product from price and allocation controls for a period of not more than 90 days if he determined that (i) application of controls to the type of oil or product involved was unnecessary to accomplish the purposes of the Act, (ii) there was no shortage of the oil or product, and (iii) the exemption would not have an adverse impact on the supply of other oil or products. Any such decontrol determination was made subject to veto by either House of Congress (15 U.S.C. (Supp. IV 1974) 753(g)(2)).

2. As the February 28, 1975 expiration date of the EPAA approached, Congress extended the mandatory allocation and price controls of the EPAA for an additional six months, through August 31, 1975 (Pub. L. No. 93-511, 88 Stat. 1608). By the summer of 1975, however, the appropriate duration of controls on crude oil beyond that date had become a subject of political disagreement between President Ford and Congress. On July 16, 1975, pursuant to Section 4(g)(2) of the EPAA, the President submitted to Congress a plan for the decontrol of crude oil prices over a 30-month period (40 Fed. Reg. 30030, 30035-30036 (1975)), but that plan was disapproved by the House of Representatives on July 22, 1975. 121 Cong. Rec. 23983 (1975). A subsequent plan to phase out controls over a 39-month period

was submitted on July 29, 1975 (40 Fed. Reg. 31741), but that plan also was promptly disapproved by the House of Representatives (121 Cong. Rec. 25881-25882 (1975)).

These two decontrol plans proposed by President Ford were salvos in the broader give-and-take between the President and Congress in working toward a compromise regarding the extension of price controls beyond the August 31, 1975 expiration date of the EPAA. See Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369, 1390-1393 (1977). Congress for a number of months had been considering bills to address that question,[1] and many Members of the House opposed the President's decontrol plans on the ground that the normal legislative process for the consideration of the pending bills was a preferable way to address the problem.[2]

Moreover, on July 21, 1975—the day before the House of Representatives disapproved the first of the President's proposals—the President had vetoed a bill (H.R. 4035, 94th Cong., 1st Sess.) that would have extended the EPAA to December 31, 1975, established a maximum price for domestic crude oil, and altered the provisions for congressional review of decontrol plans submitted to Congress under Section 4(g)(2) of the EPAA. See H.R. Conf. Rep.

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[1] S. 622, 94th Cong., 1st Sess. (1975); H.R. 7014, 94th Cong., 1st Sess. (1975). The former bill ultimately was enacted as the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871 *et seq.* See page 6, *infra*.

[2] See, *e.g.*, 121 Cong. Rec. 23961 (1975) (remarks of Rep. Wirth); *id.* at 23962-23963 (remarks of Rep. Anderson); *id.* at 23972 (remarks of Rep. Dingell); *id.* at 23976-23977 (remarks of Rep. Heinz); *id.* at 23979 (remarks of Rep. Moss and Rep. O'Neill); *id.* at 25874 (remarks of Rep. Staggers).

94-356, 94th Cong., 1st Sess. (1975). The President stated in his veto message that if the alternative plan he had proposed for phased decontrol was not disapproved by Congress, he would accept a simple extension of the price and allocation provisions of the EPAA, but that if Congress did not accept his plan, he would have no choice but to veto even a simple six-month extension of the EPAA (121 Cong. Rec. 23959-23960 (1975)).[3] However, as petitioners concede (Pet. 27-28), even the Administration recognized that if one of the decontrol plans had not been disapproved by either House and if Congress in turn had simply extended the EPAA, Section 4(g)(2) of the EPAA would have required the President to resubmit his 30 or 39-month decontrol proposal to Congress every 90 days.[4]

Subsequently, Congress enacted a law to extend the EPAA temporarily to November 15, 1975, in order "to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy" (Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, § 4, 89 Stat. 481). The temporary extension act expressed the intent of Congress that the "status quo shall be maintained" and that the President should not institute any major change in petro-

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[3] The President subsequently did veto a bill (S. 1849, 94th Cong., 1st Sess. (1975)) providing for a simple six-month extension of the EPAA, explaining that he would accept only a 45-day extension (121 Cong. Rec. 28199 (1975)). His veto was sustained by the Senate (*id.* at 28489), and Congress then passed and the President signed the shorter extension discussed in the text, page 5, *infra*.

[4] See 121 Cong. Rec. 23960, 23961, 23962, 23963, 25872 (1975) (remarks of Rep. Anderson); *id.* at 23963 (remarks of Rep. Eckhardt).

leum pricing policy under Section 4(g)(2) of the EPAA prior to November 1, 1975. When Congress was unable to meet the November 15 deadline, it again briefly extended the EPAA to December 15, 1975 (Pub. L. No. 94-133, 89 Stat. 694).

3. Ultimately, in December 1975, Congress passed and the President signed the Energy Policy and Conservation Act of 1975 (EPCA), which embodied a compromise solution to the long-term petroleum pricing controversy (Pub. L. No. 94-163, 89 Stat. 871 *et seq.*). In the EPCA, Congress extended the mandatory allocation and pricing provisions in Section 4(a) of the EPAA for an additional 40 months and granted the President discretionary authority to retain controls after that date to September 30, 1981 (§ 461, 89 Stat. 955).

The amendments made to the EPAA by the EPCA authorized the President to adjust the ceiling price for crude oil, even during the period of mandatory controls, to take into account inflation and to provide production incentives for development of high-cost, high-risk properties (§ 8(d), 15 U.S.C. 757(d)). However, any actions to increase crude oil prices in excess of a 3% limitation on incentive adjustments or to increase prices beyond an overall 10% limitation for combined inflation and incentive adjustments were subject to a one-House legislative veto (15 U.S.C. 757(e)). In addition, the President was permitted, subject to a legislative veto, to lift controls for a particular product (other than crude oil) by converting the controls to a stand-by status (15 U.S.C. 757(e)). This provision essentially replaced the prior Section 4(g)(2) of the EPAA, which was repealed by Section 401(b)(1) of the EPCA, 89 Stat. 946.

4. None of the legislative veto provisions contained in the EPCA amendments was ever exercised. President Carter instituted phased decontrol effective Jan-

uary 1980 (44 Fed. Reg. 66186 (1979)), and President Reagan ended all controls on January 28, 1981 (Exec. Order No. 12,287, 46 Fed. Reg. 9909 (1981)). The EPAA, as amended, expired on September 30, 1981, but Congress specified that the expiration of control authority "shall not affect * * * any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date." § 18, 15 U.S.C. 760g.

**B. The Proceedings in These Consolidated Cases**

1. The judgment of the Temporary Emergency Court of Appeals (TECA) that petitioners ask this Court to review was rendered in two consolidated cases:

***a. Stripper Well Proceedings***

The first of the consolidated cases involves a challenge to the validity of an administrative ruling that interpreted a statutory and regulatory exemption from price controls for so-called "stripper wells," which are properties with an average daily production per well of not more than 10 barrels of crude oil. The ruling, first issued in December 1974, provided that injection wells (wells used to inject liquid into the reservoir to increase underground pressure) could not be counted in determining whether the exemption applies.

After Congress reenacted the statutory exemption in 1976, a number of suits were filed against the Federal Energy Administration (FEA) to challenge the exclusion of injection wells from the exemption. These suits were consolidated in the United States District Court for the District of Kansas. In June 1977, the district court, as a condition to granting

the industry plaintiffs an injunction against enforcement of the stripper well regulation as interpreted by the challenged ruling, required the plaintiffs to pay into an escrow fund the overcharges resulting from the inclusion of the injection wells. (Pet. App. 94a-97a). After several rulings on related matters, the TECA, in a decision dated July 29, 1982, sustained the Department of Energy's interpretation of the exemption. *In re Department of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982). The TECA accordingly reversed the district court's contrary holding and remanded with directions to enter judgment for the government (*id.* at 1392). This Court denied certiorari. 459 U.S. 1127 (1983).

Pursuant to the TECA's mandate, the district court on remand entered judgment against the industry plaintiffs on February 14, 1983, stating that "[t]he issue of the validity of the regulations and Rulings was finally settled" and that "[t]he effect of TECA's decision is to declare the funds deposited in escrow to be overcharges received due to violations of the petroleum pricing regulations." *In re Department of Energy Stripper Well Exemption Litigation*, 4 Energy Mgmt. (CCH) ¶ 26,445, at 29,305 (D. Kan. Sept. 13, 1983). On September 13, 1983, the district court referred to the Department of Energy the issue of the proper disposition of the overcharges. *Ibid.*

On November 14, 1983, plaintiffs filed motions for reconsideration. They contended for the first time that the statutory provisions for mandatory price controls were invalid ab initio and in their entirety because they contained legislative veto provisions that, in plaintiffs' view, were inseverable from the remainder of the EPAA. The district court certi-

fied this issue to the TECA by order dated January 27, 1984 (Pet. App. 10a-11a).

b. *NGL Proceedings*

In 1975, petitioner Exxon Corporation filed a declaratory judgment action in the United States District Court for the Northern District of Texas challenging the substantive and procedural validity of the FEA's regulations governing the pricing of natural gas liquids. In June 1983, the district court granted summary judgment in favor of the government on all issues except one. In September 1983, petitioner Exxon then moved to amend its complaint in order to challenge the validity of the EPAA and EPCA on the ground that they contained legislative veto provisions that Exxon contended were inseverable from the remainder of those Acts. Over the government's objection, the court permitted the filing of the amended complaint and certified the question presented to the TECA on the same day on which it entered a final judgment on the merits (Pet. App. 9a).

2. The TECA rejected petitioners' claim that the presence of legislative veto provisions in the EPAA and EPCA rendered those statutes void (Pet. App. 1a-40a). Applying the three-part test for retroactivity established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and applied in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982), the court first held that this Court's ruling in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), should not be applied retroactively to invalidate the EPAA and EPCA or the regulations promulgated thereunder (Pet. App. 30a-35a).

Alternatively, the TECA found that the legislative veto sections at issue were severable from the remainder of the EPAA and EPCA (Pet. App. 36a). In so

holding, the TECA followed its recent decision to the same effect in *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797 (Temp. Emer. Ct. App. 1984), cert. denied, No. 84-20 (Oct. 1, 1984). In its opinion in *Dyke* (Pet. App. 98a-135a), the TECA concluded that the one-House veto provisions were severable because the legislative history of the EPAA and EPCA showed that Congress had determined that there was a national crisis caused by the oil shortage and that Congress would not have insisted on inclusion of a legislative veto provision if doing so would have resulted in no price control legislation at all (Pet. App. 105a-111a). The TECA also rejected petitioners' argument that the regulations issued under the EPAA and EPCA were tainted and therefore invalid because they were promulgated while the statutory legislative veto provisions were in effect (Pet. App. 37a-39a).

## ARGUMENT

The decision of the court of appeals, declining at this late date to invalidate the entire price control structure erected under the EPAA because of the presence of legislative veto provisions in the EPAA and EPCA, is clearly correct and does not conflict with any decision of this Court or another court of appeals. Petitioners' position hinges entirely on the premise that Congress would have refrained altogether from imposing any price controls in the period following the Arab oil embargo if it could not retain the authority to exercise a legislative veto over the President's lifting of those controls in certain specified circumstances. This premise is directly contrary to the entire thrust of the EPAA and EPCA to *mandate* price controls. Application of the ruling in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), to invalidate the now-expired price control program

also would be inconsistent with this Court's decisions on retroactivity.

In any event, these questions have been thoroughly considered by the TECA, which is the special court established by Congress to adjudicate controversies arising under the price control program and which accordingly has acquired a special understanding of that program and its authorizing statutes (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)). Moreover, the price controls were lifted almost four years ago, in January 1981, and the statutory authority to impose controls expired on September 30, 1981. As a result, this case involves no question of the authority of the Executive to continue to exercise regulatory authority under a statute containing legislative veto provisions. Further review therefore is plainly unwarranted.

1. As an initial matter, it is essential to recognize several critical distinctions between this case and *Chadha* that cast substantial doubt on petitioners' entitlement to challenge the price control program on the basis of the legislative veto provisions in the EPAA and the EPCA amendments thereto. In *Chadha*, the House of Representatives had actually exercised a legislative veto over the Attorney General's order suspending the deportation of the alien (*INS* v. *Chadha*, slip op. 6-7). The alien therefore could point to a concrete injury—the order requiring his deportation—that resulted directly from a violation of the bicameralism and presentment requirements in Article I of the Constitution, and the alien immediately brought an action to challenge the deportation order on constitutional grounds. In this case, by contrast, petitioners can point to no such direct injury resulting from the unconstitutional ex-

ercise of a legislative veto, and petitioners wholly failed to raise their challenge in a timely fashion.

a. The only two occasions on which either House of Congress exercised the legislative veto authority were in July 1975, when the President submitted plans under the original Section 4(g)(2) of the EPAA for the phased decontrol of petroleum prices over a 30 or 39-month period. See pages 3-4, *supra*. Those plans, as the TECA noted, exceeded the 90-day limitation on exemptions under Section 4(g)(2) and would have extended beyond the then-imminent expiration of the EPAA on August 31, 1975 (Pet. App. 39a). As Congress and President Ford both recognized, and as petitioners concede (Pet. 28), even if neither House had vetoed the President's plans, an extension of the EPAA would have been required in order to furnish statutory authorization for the price controls during the period that they were to be phased out. For this reason, the plans proposed by the President in July 1975 were not self-contained and self-executing programs for gradual decontrol of the prices of petroleum products; they were intimately bound up with the give and take between Congress and the President regarding the shape of the decontrol program that both acknowledged would have to be extended in some form by *statute* beyond August 31, 1975.

Against this background, petitioners' contention (Pet. 26-28) that the court below erred in not giving effect in the year 1984 to the two decontrol plans vetoed by the House of Representatives in 1975 is frivolous. Even if one of the plans had not been disapproved by the House, there can be no assurance that Congress would have permitted that plan to remain in effect when it enacted the necessary legislation to extend price controls beyond August 31, 1975. Moreover, the President's plans were never imple-

mented by the President following their disapproval, and the entire price control program continued past July 1975 on the premise that the vetoed plans were not in effect and that the prior controls instead were fully operative. Petitioners did not challenge the continuation of controls after July 1975 on the ground that the legislative vetoes were unconstitutional. Petitioners' efforts to do so now by interjecting that issue into these cases almost eight years later surely must be barred by laches. By the same token, the President's decision to respect the legislative vetoes and to retain the controls must now be accorded de facto validity. *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976).

Petitioners' belated challenge to the House's 1975 veto of the plans fails for another reason as well. After the House of Representatives rejected the President's proposals, Congress passed and the President signed a bill extending the EPAA from August 31, 1975 to November 15, 1975, in order to furnish Congress and the President more time to arrive at a long-term solution. This extension statute on its face expressed Congress's intent that the "status quo shall be maintained" (89 Stat. 481), and it thereby approved—by bicameral action presented to and approved by the President—the continuation of the price controls that were then in effect. Congress subsequently passed and the President signed the EPCA, which likewise was premised on the continuation of price controls, with termination provisions quite different from those proposed by the President. The House of Representatives' rejection of the decontrol plans in July 1975 thus was effectively ratified and superseded by these two laws. See, *e.g.*, *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 300-301 (1937). For this reason, to the extent that petitioners were adversely af-

fected by the continuation of price controls after July 1975, that injury can no longer be attributed to the unconstitutional action by one House of Congress. See *United States* v. *Wyatt*, 680 F.2d 1082, 1087 (5th Cir. 1982).

Although the EPCA amendments to the EPAA also contained several legislative veto provisions, neither House of Congress actually exercised a veto over any Presidential actions under those amendments. Thus, petitioners likewise cannot trace any injury resulting from the continuation of price controls after the enactment of the EPCA in December 1975 to an actual violation of the bicameralism and presentment requirements. Compare *Muller Optical Co.* v. *EEOC*, No. 83-5889 (6th Cir. Sept. 4, 1984), slip op. 12-15.

b. Petitioners nevertheless contend (Pet. 16-22) that they are entitled to a judgment invalidating the entire price control program because of the mere presence of the legislative veto sections in the EPAA and EPCA. However, because petitioners can claim no violation of their own constitutional rights or any injury traceable to those provisions, they do not appear to have standing to challenge them. *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-14; *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 471-476 (1982).[5] Compare *INS* v. *Chadha*, slip op. 14-15. Petitioners seem to believe that it is sufficient for standing purposes that they were adversely af-

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[5] See *United States* v. *Sutton*, 585 F. Supp. 1478, 1480-1481 (N.D. Okla. 1984); *United States* v. *Exxon Corp.*, 4 Energy Mgmt. (CCH) ¶ 26,447 (D.D.C. Aug. 29, 1983), appeal docketed, No. DC-93 (Temp. Emer. Ct. App.); *Citronelle-Mobile Gathering, Inc.* v. *Gulf Corp.*, 420 F. Supp. 162, 170 (S.D. Ala. 1976), remanded, 578 F.2d 1149 (5th Cir. 1978), appeal dismissed on other grounds, 591 F.2d 711 (Temp. Emer. Ct. App.), cert. denied, 444 U.S. 879 (1979).

fected by the price controls imposed under the EPAA, because, in their view, Congress would not have enacted the EPAA or extended it in the EPCA without the legislative veto provisions. Insofar as we are aware, however, this Court has never held that a plaintiff is entitled to a judgment voiding an Act of Congress in its entirety on the ground that Congress would not have enacted the law if it had known that a particular provision that has no effect on the plaintiff would subsequently be held unconstitutional.[6]

2. In any event, the TECA was clearly correct in holding that the presence of the legislative veto provisions did not require invalidation of the EPAA and the massive price control program established under it. This Court has instructed that "[t]he cardinal principle of statutory construction is to save and not to destroy." *Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion), quoting *NLRB* v. *Jones*

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[6] The TECA in the instant case essentially followed its prior ruling in *Gulf Oil Corp.* v. *Dyke, supra*, with regard to standing (Pet. App. 29a-30a). In *Dyke*, the TECA concluded that Gulf Oil, which had appealed a final judgment of a district court that it had violated the EPAA, had standing to challenge the constitutionality and severability of the legislative veto provisions because, in the TECA's view, those questions had a bearing on its subject matter jurisdiction to entertain the appeal pursuant to Section 211 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note (Pet. App. 136a-140a), as incorporated by Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1) (Pet. App. 152a). See Pet. App. 105a & n.23. We disagree. Under paragraphs (c) and (g) of Section 211 of the ESA, the TECA is expressly granted jurisdiction to decide questions concerning the constitutionality of the EPAA. A holding that the Act is unconstitutional therefore does not affect the TECA's subject matter jurisdiction to decide that very question. Put another way, even if the unconstitutional legislative veto provisions are inseverable from the other substantive provisions of the EPAA, they clearly are severable from its jurisdictional provisions.

*& Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Accordingly, an unconstitutional portion of a statute is to be severed from the remainder "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *INS* v. *Chadha*, slip op. 10, quoting *Buckley* v. *Valeo*, 424 U.S. at 108, and *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). In addition, any invalid provision is "presumed severable if what remains after severance 'is fully operative as a law' " (*INS* v. *Chadha*, slip op. 13). See *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 10-11. That is precisely the legal test used by the lower court in *Gulf Oil Corp.* v. *Dyke* (Pet. App. 107a), which was followed by the panel in this case (Pet. App. 36a).[7]

The TECA also correctly applied that test in the circumstances of this case. First, the EPAA indisputably would have been "fully operative as a law" if its legislative veto provisions were severed for the period during which price controls remained in effect. The statutorily mandated price and allocation controls of course could have remained in force for that period, along with the Presidential decontrol au-

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[7] In light of this Court's repeated and explicit directions to consider whether the provisions that Congress actually and validly enacted are severable from those that are unconstitutional, petitioners' contention (Pet. 16-17) that the court of appeals should have considered whether Congress might have enacted some *other* version of a price control statute is without merit. Since petitioners do not identify any obvious alternative that Congress would have enacted, their suggested approach would entail endless speculation concerning possible alternatives and their relative feasibility and acceptability. Neither *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 60 (1922), nor *Consumers Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983), relied upon by petitioners (Pet. 17), supports such a requirement.

thorities. Without the provisions for a one-House veto, the decontrol provisions would have operated like the "report and wait" procedure involved in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941). "Such a procedure is not only workable, but preserves to the greatest extent possible the compromise between Congress and the Executive intended in the legislation" (*Gulf Oil Co.* v. *Dyke* (Pet. App. 109a-111a & n.26)). See *INS* v. *Chadha*, slip op. 13-14 & nn.8, 9.

Second, this is by no means a case in which "it is evident that the Legislature would not have enacted those provisions which are within its powers, independently of that which is not" (*INS* v. *Chadha*, slip op. 10). To the contrary, Congress enacted the EPAA as emergency legislation in 1973 in the wake of the Arab oil embargo. It is virtually inconceivable that Congress would have failed to enact the urgently needed controls if it could not retain the authority under Section 4(g)(2) to exercise a one-House veto over limited 90-day exemptions that could be granted only where the President had determined that controls were *not* needed. Indeed, if Congress had known that the legislative veto device was unconstitutional, it is far more likely that its response would have been to eliminate *any* authority for the President to establish an exemption or to curtail more sharply the scope of that authority.

Petitioners seek to avoid this obvious conclusion by arguing (Pet. 18-19) that because President Nixon was opposed to mandatory controls, the "political stalemate" would not have been broken without the provision permitting the President to exempt a product from controls for up to 90 days, which in turn was acceptable to Congress only when coupled with a legislative veto. But again this argument ignores the emergency climate in which Congress acted.

As petitioners concede (Pet. 17-18), the separate versions of the EPAA that passed the House and the Senate did not contain a provision for exemptions by the President, and yet each passed by a margin well in excess of that required to override a Presidential veto. 119 Cong. Rec. 18064, 34477 (1973).[8] For this reason, the premise of petitioners' argument—that President Nixon successfully could have resisted the imposition of mandatory controls in the absence of a provision for Presidential exemption—is speculative at best.

Just as important, President Nixon did not oppose mandatory controls by the time the EPAA was enacted. The materials petitioners cite (Pet. 17-18) show only that the President wanted some provision for removing controls at a later date, not that he was opposed to their imposition at the outset. Moreover, the President's opposition was principally to allocation controls, since he already had imposed price controls on petroleum products under the Economic Stabilization Act (ESA). See page 2, *supra*. And even as to allocation controls, although President Nixon initially preferred a voluntary approach (see

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[8] Petitioners rely (Pet. 18-19) on a statement by Representative Staggers describing the decontrol/legislative veto provision in Section 4(g) of the EPAA as one of the "significant matters agreed to in conference." Their focus on this statement is misleading, however, because Representative Staggers summarized his remarks by noting that the conference bill "depart[ed] in only minor ways from the [initial] House-passed bill," which contained no legislative veto provisions. 119 Cong. Rec. 36866 (1973). He described the provision for limited exemptions as intended to permit the President some flexibility in implementing the control program. There is no indication that Section 4(g)(2) was intended to permit wholesale "decontrol," as petitioners imply (see Pet. 18-19).

Pet. 17-18), he later recognized that "a mandatory allocation system [was] necessary" and issued mandatory allocation regulations for certain products under the ESA in October 1973. 9 Weekly Comp. Pres. Doc. 1213 (Oct. 2, 1973). Furthermore, after the Arab oil embargo, President Nixon requested that Congress act promptly in passing the various pending emergency energy bills, specifically including authority to allocate petroleum products.[9]

For similar reasons, petitioners also err in contending (Pet. 19-21) that the legislative veto provisions in the EPCA amendments to the EPAA were inseverable. As petitioners concede (Pet. 19-20), Congress was as intent on having price controls in 1975 as it was in 1973. It therefore is clear that if Congress had known that the legislative veto device was unconstitutional, it would not have chosen to end all price controls abruptly in the fall of 1975 by allowing the EPAA to expire. Even the President's proposals that were disapproved by the House of Representatives in July 1975 did not call for immediate and total decontrol in that manner. They would have provided for a phased decontrol over 30 or 39 months, periods that were not far short of the 40-month extension of mandatory controls subsequently enacted

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[9] 9 Weekly Comp. Pres. Doc. 1319 (Nov. 8, 1973). The letter cited by petitioners (Pet. 18) from John Love, Assistant to the President, to Representative Staggers was written prior to this announcement. Moreover, the letter nowhere suggested inclusion of a Presidential decontrol provision. Rather, the Administration's criticism of the House bill was directed to a rigid allocation formula based on historical use and the lack of flexibility in determining whether to impose controls on the allocation of the production of oil. 119 Cong. Rec. 34312-34313 (1973). Congress acted to alleviate those concerns. See H.R. Rep. 93-628, 93d Cong., 1st Sess. 12, 22 (1973).

in the EPCA. There accordingly is no reason to believe that any new legislative veto provisions in the EPCA were critical to enable the President and Congress to reach an agreement on the basic question of the extension of mandatory controls.[10]

In fact, during the 40-month period of mandatory controls for crude oil adopted in the EPCA, Congress granted the President authority to permit annual incentive adjustments of up to 3% and combined adjustments for incentives and inflation of 10% without a legislative veto and to permit greater increases for crude oil subject to a legislative veto. 15 U.S.C. 757(d) and (e).[11] Congress thus perceived no inconsistency between extending mandatory controls and at the same time allowing the President to increase the allowable price in specified circumstances. It therefore is wholly unreasonable to believe, as petitioners urge (Pet. 20-22), that Congress would have intended a court to strike down the entire EPAA price control program if it invalidated the statutory provisions permitting a legislative veto of certain limited price increases by the President. That result would have removed crude oil prices even from Presidential control and would have allowed price increases whether or not they were tied to inflation

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[10] Contrary to petitioners' contention (Pet. 20), the Senate did not "specifically vote[]" in the spring of 1975 to retain the legislative veto power. The floor amendment involved did not even refer to a legislative veto, and the passing reference to the veto power was part of Senator Jackson's statement in opposition to the amendment. 121 Cong. Rec. 9857 (1975).

[11] Congress also authorized the President, subject to a legislative veto, to convert controls to a standby status for products other than crude oil. 15 U.S.C. 760a.

or the need for production incentives, as required by 15 U.S.C. 757.[12]

3. a. Even if the legislative veto provisions of the EPAA were not severable from the remainder of the statute, petitioners still could not prevail unless this Court's decision in *Chadha* were to apply retroactively. The TECA was clearly correct in its alternative holding (Pet. App. 30a-35a) that *Chadha* should not be applied to invalidate the system of price controls established under the EPAA. All three of the relevant considerations this Court has identified weigh heavily against retroactive application. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (Brennan, J.), quoting *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

First, the Court in *Chadha* decided "an issue of first impression whose resolution was not clearly fore-

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[12] Petitioners' reliance (Pet. 21) on the absence of an explicit severability clause in the EPAA is also misplaced. First, as the court below recognized in *Gulf Oil Corp.* v. *Dyke*, *supra* (Pet. App. 106a n.24), the express incorporation of Section 211 of the ESA into the EPAA strongly implies that Congress intended severability. Section 211(g) vests the TECA and this Court with exclusive authority to "determine the constitutional validity of *any provision* of this title" and to invalidate the statute *"in whole or in part."* 12 U.S.C. (1976 ed.) 1904 note (emphasis added).

Second, petitioners' assertion that the lack of an explicit severability clause creates a presumption of inseverability is contrary to this Court's statement in *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968), which was quoted and relied upon by the court below in *Gulf Oil Corp.* v. *Dyke* (Pet. App. 107a), that "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." See also *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984); *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983).

shadowed" by earlier cases (*Northern Pipeline*, 458 U.S. at 88). Before *Chadha*, this Court had never addressed the issue; only Justice White had expressed a view on the validity of the legislative veto device, and he would have sustained it. See *Buckley* v. *Valeo*, 424 U.S. at 284 (White, J., concurring and dissenting). The initial court of appeals' opinion on the subject was *Atkins* v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977) (en banc), cert. denied, 434 U.S. 1009 (1978), which likewise sustained the constitutionality of a legislative veto provision. The first conflicting decision by a court of appeals was that of the Ninth Circuit in *Chadha* v. *INS*, 634 F.2d 408, which was rendered in December 1980—well after Congress had enacted the EPAA and EPCA and only a month before President Reagan lifted all controls under the EPAA in January 1981. Thus, when the price controls were in effect, this Court's decision in *INS* v. *Chadha* was not clearly foreshadowed.[13] Indeed, the fact that petitioners did not attempt to interject the legislative veto issue into these cases until after this Court rendered its decision in *Chadha* in 1983—long after they had filed suit beginning in 1975—substantially undermines the credibility of their current assertion that the holding in *Chadha* was so preordained as to compel retroactive application.

Second, retroactive application of *Chadha* in this case plainly is not necessary to further the operation

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[13] Contrary to petitioners' assertion (Pet. 13), this conclusion is not undermined by the fact that successive Presidents had questioned the constitutionality of the legislative veto. In *Marathon*, the Court declined to give retroactive effect to its holding even though Members of Congress had expressed serious reservations about the constitutionality of the jurisdictional provisions of the Bankruptcy Act of 1978. See 458 U.S. at 61 n.12, 88 (opinion of Brennan, J.).

of that decision (*Northern Pipeline*, 458 U.S. at 88). The essential holding in *Chadha* was that "action of one House of Congress * * * violates strictures of the Constitution" (slip op. 23). Here, however, there was no "action of one House of Congress" under the EPCA, since neither House ever exercised a legislative veto under that Act. And, although the House of Representatives did disapprove two proposed decontrol plans in July 1975 under the EPAA as originally enacted, those disapprovals were effectively ratified and superseded by Acts of Congress, including the EPCA. Retroactive application of *Chadha* therefore is not necessary in this case to remedy any injury resulting from an actual violation of the bicameralism and presentment requirements of the Constitution. Nor is application of *Chadha* necessary here to prevent future exercises of the veto or even to prevent the continuation of price controls free of the check of a legislative veto mechanism, because the EPAA expired in September 1981.

Third, retroactive application of *Chadha* in the circumstances of this case clearly would produce "substantial inequitable results" (*Northern Pipeline*, 458 U.S. at 88). If the decision were made fully retroactive, the result would be to permit the challenging of millions of completed transactions and numerous final judgments and settlements. There is a compelling public interest in avoiding such disruption. Petitioners seek to avoid that result by contending (Pet. 15) that a retroactive application of *Chadha* in this setting could be limited to pending proceedings and to future actions that are timely brought. But that approach would only intensify the inequities. Those parties who, like petitioners herein, fortuitously happen still to be involved in litigation arising under the price control program or who would not be time-

barred under state law from bringing an action in the future would be permitted to avoid price controls altogether for the relevant period, a wholly unjustified windfall for those who had violated the regulations under which the rest of the Nation operated.

b. Petitioners also err in contending (Pet. 10-11) that this Court's summary affirmances in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982), aff'd, No. 82-935 (July 6, 1983), and *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), aff'd, No. 82-184 (July 6, 1983), require retroactive application of *Chadha* in the circumstances of this case. The retroactivity question was not even raised in the *FTC* and *FERC* cases. Moreover, the court of appeals in those cases had held the challenged legislative veto provisions unconstitutional before this Court rendered its decision in *Chadha*. The affirmance of those decisions on direct appeal therefore did not require a "retroactive" application of *Chadha*, and it would have been unfair to the plaintiffs to deprive them of the benefit of a favorable appellate decision that fully accorded with the subsequent holding by this Court in *Chadha* merely because this Court had not yet spoken at the time the court of appeals rendered its decision.

Furthermore, in both the *FERC* and *FTC* cases, unlike in the instant case, a legislative veto had actually been exercised and had not been ratified by a subsequent law. Accordingly, this Court's affirmance of the court of appeals' decisions served to remedy actual constitutional violations, just as in *Chadha* itself. Finally, in the *FERC* and *FTC* cases, the parties claiming to have been injured by the veto immediately brought suit to challenge it. In this case, by contrast, petitioners delayed for a number of years before challenging the price control program on legis-

lative veto grounds. In the intervening period, there had been pervasive reliance throughout the Nation on that program as it had been implemented. See Pet. App. 34a-35a.[14]

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[14] Petitioners mistakenly rely (Pet. 11-12) on six district court decisions that they contend support the retroactive application of *Chadha* here. The first of the decisions, *Alaska Airlines, Inc.* v. *Donovan*, No. 84-485 (D.D.C. May 18, 1984), appeal pending, No. 84-5467 (D.C. Cir. filed July 26, 1984), involved a challenge to regulations promulgated after *Chadha*, pursuant to a statute that contained a legislative veto provision. There was no question regarding the retroactive application of *Chadha* to invalidate prior Executive action, as in this case.

Three more of the cases petitioners cite involved challenges to the EEOC's enforcement of the Equal Pay Act and the Age Discrimination in Employment Act on the ground that the Reorganization Plan transferring enforcement authority from the Secretary of Labor to the EEOC was invalid because the Reorganization Act contained an assertedly inseverable legislative veto provision. See also *EEOC* v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), petition for reh'g pending. Congress since has passed a law ratifying all past Reorganization Plans (Pub. L. No. 98-532, 98 Stat. 2075), thereby mooting the issue in the cases upon which petitioners rely and suggesting that past Executive actions that were not vetoed should not be set aside in the wake of *Chadha*. We note as well that before Congress acted, the vast majority of lower court decisions had sustained the enforcement authority of the EEOC, notwithstanding the presence of the legislative veto provision in the Reorganization Act. See cases cited in Reply Br. for Appellant 4 n.2, *EEOC* v. *Allstate Insurance Co.*, appeal dismissed, No. 83-1021 (June 11, 1984), and J.S. at 6-7 n.2, *EEOC* v. *Martin Industries, Inc.*, appeal dismissed, No. 88-1893 (Oct. 1, 1984). See, *e.g.*, *Muller Optical Co.* v. *EEOC*, *supra*; *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

In *Allen* v. *Carmen*, 578 F. Supp. 951 (D.D.C. 1983), there had been repeated exercises of the legislative veto to invalidate the regulations implementing the Presidential Recordings and Materials Preservation Act (44 U.S.C. 2107 note), and the

4. Petitioners' final contention (Pet. 22-26)—that the President was deterred in 1975 and 1976 from proposing certain decontrol measures because of the possibility that one House of Congress might disapprove them—is even less worthy of review. Petitioners apparently would have the courts below substitute for the controls that the President actually implemented some other set of controls that the President *might* have promulgated if he had been free of the possibility of a legislative veto. Petitioners do not suggest what form the alternative set of controls might have taken, and it would be wholly speculative and unrealistic for a court to attempt at this late date to ascertain the President's supposed "intent" in this regard and to fashion its own set of hypothetical controls to approximate that intent.

Nor do the circumstances of this case remotely suggest the occasion for such an extraordinary judicial undertaking. Even if petitioners are correct (Pet. 23-24) that the President was initially dissuaded in early 1975 from submitting certain decontrol proposals to Congress, the fact remains that the

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court found that there would not be substantial inequitable results if *Chadha* were applied retroactively (578 F. Supp. at 966-968). Neither of those factors is present here. The final decision petitioners cite, *City of Alexandria* v. *United States*, 3 Cl. Ct. 667, 675-678 (1983), did not even involve a legislative veto provision, but the court nevertheless reasoned that a congressional committee had impermissibly intervened in Executive actions. There was no such interference here. Moreover, as petitioners concede (Pet. 11-12), the Claims Court's decision was subsequently reversed by the Federal Circuit, which found *Chadha* inapplicable and further found no constitutional violation on the facts presented. *United States* v. *City of Alexandria*, 737 F.2d 1022 (1984).

President subsequently did propose plans in July 1975 to phase out controls over 30 or 39 months. When Congress extended the EPAA in 1975 and effectively ratified the House of Representatives' disapprovals of those two plans, it also necessarily rendered moot any controversy regarding the legal viability of any plans that the President previously might have considered but did not even submit to Congress.

Petitioners' contention (Pet. 25) that the maintenance of controls after enactment of the EPCA in 1975 was fatally "tainted" by the fear of a legislative veto is equally flawed. President Carter stressed soon after assuming office that he was "committed to the retention of domestic oil price controls for the foreseeable future to prevent windfall profits for oil producers who would otherwise be able to charge the OPEC-determined world price of oil." 13 Weekly Comp. Pres. Doc. 573, 578 (Apr. 20, 1977). And after price controls became discretionary in April 1979, President Carter did not exercise his authority immediately to decontrol all crude oil and refined products, but implemented only a phased program of gradual decontrol. Petitioners' contention that the mere existence of the legislative veto provisions caused decontrol proposals to be "held hostage" also ignores the series of decontrol measures that in fact were implemented by the President. See 41 Fed. Reg. 13898 (1976) (residual fuel oil); *id.* at 24516 (middle distillates); *id.* at 30096 (general refinery products); *id.* at 40451 (naphtha jet fuel).

In any event, petitioners cannot be heard in 1984 to challenge what they contend (Pet. 25) was a too "cautious" approach to decontrol by the Executive under the EPCA beginning in 1976 on the basis of nothing more than a few passages in internal Execu-

tive Branch memoranda reflecting a concern about possible congressional or public reaction—a concern that might have equally influenced the President even in the absence of a formal legislative veto mechanism. As with other aspects of petitioners' submission in this Court, their failure to perceive this supposed "taint" in the administration of the price control program at any earlier date itself indicates that there was no fundamental defect that should now cast doubt on the validity of that expired program.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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